Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision	)	CG Docket No. 18-152
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

COMMENTS OF THE STUDENT LOAN SERVICING ALLIANCE; NAVIENT CORP.; NELNET SERVICING, LLC; AND PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY

I. Introduction.

The Student Loan Servicing Alliance ("SLSA"); Navient Corp. ("Navient"); Nelnet Servicing, LLC ("Nelnet"); and the Pennsylvania Higher Education Assistance Agency ("PHEAA")[1] respectfully submit these Comments in response to the Public Notice released on October 3, 2018, by the Federal Communications Commission ("FCC" or "Commission") Consumer & Governmental Affairs Bureau in the above-captioned proceedings.[2] As discussed below, the Commission should clarify that equipment qualifies as an "automatic telephone dialing system" ("ATDS") only if it possesses the functions expressly included in the statutory

[1] Great Lakes Higher Education Corp. ("GLHEC") participated in prior filings on behalf of its former affiliate, Great Lakes Education Loan Servicing Inc. ("GLELSI"). GLHEC sold its interest in GLELSI to Nelnet effective February 1, 2018.

[2] *Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision*, Public Notice, CG Docket Nos. 02-278, 18-152 (CGB rel. Oct. 3, 2018) ("Public Notice").

definition of ATDS, consistent with our prior comments in these proceedings.[3] The Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC* ("*Marks*") has little persuasive value and should not inform the Commission's analysis, as it misinterprets the Telephone Consumer Protection Act ("TCPA") on this issue.[4]

II. The Commission Should Properly Interpret "ATDS" to Include Only Equipment that Has and Uses a Random or Sequential Number Generator to Store or Produce Numbers and Dials those Numbers Without Human Intervention.

The Commission should clarify that equipment qualifies as an ATDS only if it actually possesses the functions expressly stated in the ATDS definition, namely (i) storing or producing numbers to be called, *using a random or sequential number generator*, and (ii) dialing those numbers.[5] The text of the definition of ATDS requires that an ATDS have the capacity not only to "store or produce numbers to be called," but also to do so "using a random or sequential number generator."[6] The text expressly requires these elements in tandem because the phrase "using a random or sequential number generator" is most naturally read to refer to the means by which equipment can "store or produce telephone numbers to be called."[7] Section 227(a)(1)(B), in turn, requires that equipment does not qualify as an ATDS unless it has the capacity to "dial such numbers," *i.e.*, numbers that have been stored or produced using a random or sequential number generator. Congress's choice of the phrase "using a random or sequential number generator" was informed by its primary motivation for adopting the TCPA: to curb abusive telemarketing calls that tied up emergency and business lines and imposed unwanted charges on

[3] *See* Comments of SLSA, Navient, Nelnet, and PHEEA, CG Docket Nos. 02-278, 18-152, at 20-23 (filed June 13, 2018) ("Coalition Comments").

[4] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. 2018) ("*Marks*").

[5] 47 U.S.C. § 227(a)(1); *ACA Int'l, et al. v. FCC*, 885 F.3d 687, 701 (D.C. Cir. 2018).

[6] 47 U.S.C. § 227(a)(1)(a).

[7] *See id.*; *see also Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 120-21 (3d. Cir. 2018); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938-39 (N. D. Ill. 2018); *Fleming v. Assoc. Credit Services, Inc.*, 2018 WL 4562460, at *9-10 (D. N.J. Sept. 9, 2018).

cell phones subscribers *through random or sequential dialing*.[8] The Commission should confirm that equipment constitutes an ATDS only if it meets every component of the statutory definition.

Such an approach would continue to protect consumers while remaining consistent with the statutory text of the TCPA, Congress's intent, the D.C. Circuit's *ACA v. FCC* decision, and contemporary consumer communications expectations. This interpretation would, for example, continue to protect consumers by restricting and requiring consent for "scattershot" automatic dialing to randomly or sequentially generated numbers, the key activity sought to be restricted by Congress with the ATDS definition.[9] In addition, this interpretation would protect good-faith callers from unwarranted class action litigation exposure when placing time-sensitive calls to consumers.

In addition, the FCC should confirm both that equipment qualifies as an ATDS only if it can perform the requisite functions above without human intervention and that the TCPA applies only to calls that are made using the ATDS functionality. A call that entails human interaction (even a single click, analogous to speed dialing) is not automatic under the TCPA.[10] Moreover, the statute defines ATDS based on specific functionality, so it is both reasonable and appropriate to interpret the prohibition as limited to the uses of that functionality. Requiring the requisite

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[8] *See* S. Rep. No. 102-178, at 2 (1991); H.R. Rep. No. 102-317, at 2 (1991); *see also Marks* at 4-5.

[9] *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, ¶ 19 (1995) ("The TCPA requires that calls dialed to numbers generated randomly or in sequence (autodialed) . . . must identify the caller . . . . Household correctly points out that debt collection calls 'are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers for debtors.'"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, ¶ 39 (1992) ("With respect to concerns regarding compliance with both the FDCPA and our rules in prerecorded message calls, we emphasize that the identification requirements will not apply to debt collection calls *because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator)*.") (emphasis added).

[10] *See, e.g.*, Coalition Comments at 22-23.

functionality to actually be used would also help eliminate any lingering ambiguities about "capacity," as the D.C. Circuit pointed out.[11]

III. The Ninth Circuit's *Marks* Decision Misinterprets the TCPA in Concluding that "ATDS" Includes Equipment that Has the Capacity to Dial Stored Numbers.

The Ninth Circuit's *Marks* decision is the product of a flawed analysis and has little persuasive value.[12] First, the Ninth Circuit failed to apply the canon of statutory construction that "a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma," disregarding prior Ninth Circuit precedent.[13] Indeed, "when a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents."[14] Accordingly, the phrase "using a random or sequential number generator" is properly read as modifying both the words "store" and "produce" in Section 227(a)(1)(A).

Second, the Ninth Circuit incorrectly assumed that Congress tacitly approved of a prior FCC interpretation.[15] In 2015, Congress added a surgical exemption to protect a specific type of call – federal debts calls.[16] There is no evidence that Congress was even aware of the purported administrative interpretation the Ninth Circuit cites, let alone intended to adopt it.[17] For instance,

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[11] *ACA Int'l*, 885 F.3d at 718-19.

[12] Notably, other courts of appeal have interpreted the term "ATDS" far more narrowly since the D.C. Circuit's decision in *ACA v. FCC*. *See, e.g., Dominguez*, 894 F.3d at 121 (emphasizing that the "key factual question" was "whether the [platform] functioned as an autodialer by randomly or sequentially generating telephone numbers, and dialing those numbers").

[13] *See, e.g., Yang v. Majestic Blue Fisheries*, LLC, 876 F.3d 996, 1000 (9th Cir. 2017) (quoting *Davis v. Devanlay Retail Grp., Inc*., 785 F.3d 359, 364 n.2 (9th Cir. 2015)).

[14] *Am. Int'l Grp, Inc. v. Bank of Am. Corp*, 712 F.3d 775, 781-82 (2d Cir. 2013).

[15] *Marks* at 21-22.

[16] *See* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (codified at 47 U.S.C. § 227(b)(1)(A)(iii)).

[17] *See, e.g., OfficeMax, Inc. v. U.S.*, 428 F.3d 583, 595-96 (6th Cir. 2005) ("[T]he [reenactment] doctrine does not apply when 'the record of congressional discussion preceding reenactment makes no reference to the interpretation, and there is no other evidence to suggest that Congress was even aware of the agency's

there is no text in the 2015 Bipartisan Budget Act or its legislative history on this point.[18] The Ninth Circuit erred by merely assuming that Congress was aware of the FCC's prior decisions when it enacted the federal debts exemption.[19] Moreover, the presumption cited by the Ninth Circuit should not apply at all in cases where, as here, a federal agency decision interpreting the statute in question was on appeal at the time of a Congressional amendment to adopt a separate, limited exception. And, in any case, the theory of legislative ratification by reenactment "cannot overcome the plain meaning of a statute,"[20] which is that "using a random or sequential number generator" modifies both "store" and "produce" in Section 227(a)(1)(A).

Third, the Ninth Circuit incorrectly assumed that the "prior express consent" exception suggests that equipment that makes automatic calls from lists of recipients is an ATDS.[21] An ATDS need not be able to dial from a list of numbers to persons who had consented to such calls for the "prior express consent" exception, as it is used in the TCPA, to have a purpose. The "prior express consent" exception allows certain prerecorded calls regardless of what the term "ATDS" means, for example. Calls from lists do not implicate the harms of autodialing random or sequential numbers and therefore fall outside the definition of "ATDS."

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interpretive position.'"); *Micron Tech., Inc. v. U.S.*, 243 F.3d 1301, 1311-12 (Fed. Cir. 2001) (explaining that the "presumption of implicit Congressional approval of an administrative interpretation requires that Congress be aware of the existence of the agency's interpretation").

[18] *See id*.

[19] *See, e.g., Bernardo ex rel. M & K Eng'g, Inc. v. Johnson*, 814 F.3d 481, 489–90 (1st Cir.), cert. denied, 136 S. Ct. 2487, 195 L. Ed. 2d 823 (2016) (explaining that "it is generally inappropriate to apply the doctrine of legislative ratification without some evidence that Congress affirmatively sought to ratify the interpretation of a statute"); *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence.").

[20] *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 819-20 (2d Cir. 2015) (citing *Demarest v. Manspeaker*, 498 U.S. 184 (1991)).

[21] *Marks* at 21.

IV. The Ninth Circuit's *Marks* Decision Does Not Reach the Meaning of the Phrase "Has the Capacity" and Should Not Keep the FCC from Focusing on Equipment's Actual Capacities at the Time of the Call.

The Public Notice seeks further comment on what devices "have the capacity to store numbers."[22] The phrase "has the capacity" was not interpreted in *Marks*.[23] As used in the TCPA, the phrase is best interpreted as encompassing the present-tense "ability" or "power" of a device, not the hypothetical future capability of the device if altered. An ordinary person would not say that equipment "has the capacity" to perform a particular function if the equipment cannot, in fact, perform that function. Moreover, as the D.C. Circuit recognized, the *2015 Order's* focus on hypothetical alteration or upgrading of equipment merely through additional software functions or app downloads created substantial ambiguity. [24] Nearly any modern computer hardware can be altered through software updates to create new capabilities, including smartphones.[25]

Limiting the phrase "has the capacity" to equipment's actual, present capacities at the time of the call would also better tether the statute to the harms that Congress was attempting to address. Such an interpretation would provide sorely needed clarity to callers and help reduce unnecessary confusion and costly litigation. For example, a caller would know if its equipment met the definition of ATDS by looking at the equipment's actual functions, rather than having to hypothesize about potential future functions. In addition, such an interpretation would support good-faith callers' ability to meet consumer demand for time-sensitive information (without fear of unwarranted litigation) while leaving undisturbed the plethora of other consumer protections, such as federal and state "do not call" laws for telemarketing.

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[22] *See* Public Notice at 1.

[23] *See Marks*.

[24] *ACA Int'l*, 885 F.3d at 699.

[25] *Id*.

V. Conclusion.

For the reasons described above and in our previous comments, [26] the Commission should clarify that equipment qualifies as an ATDS only if it possesses the functions expressly included in the ATDS definition. The Ninth Circuit's *Marks* decision, meanwhile, should not inform the Commission's analysis. The Ninth's Circuit's analysis includes a number of material errors and has little persuasive value. Instead, the Commission should focus on the statute's text and adopt the above formulation, which would protect consumers while providing a clear compliance path for good-faith callers to meet demands for time-sensitive information.

Respectfully submitted,

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[26] *See* Coalition Comments at 20-23.